

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JODDIE COVEY)	
Claimant)	
v.)	
)	Docket No. 1,071,437
KANSAS MIDWEST ENGINE WAREHOUSE)	
Respondent)	
and)	
)	
GREAT AMERICAN ALLIANCE)	
INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the February 24, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. James E. Martin of Overland Park, Kansas, appears for claimant. Jodi J. Fox of Kansas City, Kansas, appears for respondent and insurance carrier (respondent).

ISSUES

The ALJ found, based on the report of the neutral physician, Dr. Lowry Jones, claimant had a preexisting right shoulder labral tear that was not caused by her accident, but was aggravated and made symptomatic by her work activities. The ALJ denied claimant's request for medical treatment for her right shoulder because, pursuant to K.S.A. 44-508(f), claimant's injury aggravated, accelerated or exacerbated her preexisting condition, or rendered her preexisting condition symptomatic, and found the claim was therefore not compensable.

Claimant argues her accident caused a new lesion or change in the physical structure of her body, and is therefore compensable. Claimant also contends K.S.A. 44-508(f)(2) is unconstitutionally vague. Claimant requests the Board reverse the ALJ's Order.

Respondent contends the Order should be affirmed because claimant's shoulder injury was only an aggravation or exacerbation of her preexisting labral tear and "[c]laimant's pathology and symptoms are . . . a prime example of an injury that renders a preexisting condition symptomatic."¹ Respondent urges the Board to affirm the ALJ's Order.

¹ Respondent's Brief at 4 (filed Apr. 5, 2016).

The issues are:

1. Was claimant's accidental injury a sole aggravation of a preexisting condition, and therefore not compensable?
2. Is K.S.A. 44-508(f)(2) unconstitutionally vague?

FINDINGS OF FACT

The record consists of the report of Lowry Jones, M.D., dated January 14, 2016, and the pleadings contained in the administrative file. No testimony was presented and no other medical report or record was admitted into evidence.

Claimant's application for hearing alleges a September 4, 2014, accident, caused by "[p]icking up totes from floor to load onto conveyor," resulting in injuries to the right shoulder, neck, and mid and low back. A preliminary hearing was scheduled for August 5, 2015, but no record was made of that proceeding. There was, however, an agreed order entered, dated August 5, 2015, appointing Dr. Jones, an orthopedic surgeon, to perform a neutral medical evaluation. In the order appointing Dr. Jones, the ALJ requested that specific questions be addressed by the doctor, including:

1. Was the alleged work injury of September 4, 2014, the prevailing causative factor?
2. If the work was the prevailing factor, what, if any, treatment is recommended?

Dr. Jones evaluated claimant on January 14, 2016. He reviewed medical records, and other material, took a history and performed a physical examination. According to Dr. Jones, claimant was 45 years old and worked for respondent as an office manager for ten years, performing administrative functions. In approximately July 2014, claimant began filling in for the warehouse supervisor, requiring her to perform both positions.

On September 4, 2014, claimant was performing the work of the warehouse supervisor, and lifted 3-4 totes, weighing 4-5 pounds each, and placed them on a conveyor belt. Due to claimant's stature, much of the work she performed as warehouse supervisor was overhead. As claimant lifted the totes overhead, one became stuck and she felt a sharp pain in her back. Claimant thought she pulled a muscle, but by evening she had pain in her right upper back and into her shoulder.

Claimant was referred to orthopedic surgeon Dr. Dan Stechschulte, who ordered an “MRI scan post arthrogram.”² Those studies revealed a significant superior labral tear in the right shoulder, extending anteriorly.³ Claimant was treated conservatively.

Claimant has no history of prior right shoulder issues.

On physical examination, Dr. Jones found evidence of labral instability in the right shoulder, and tenderness at the costovertebral junction on the right at about T-5. Dr. Jones opined claimant sustained a sprain to the costovertebral junction of her upper thoracic spine.⁴

Dr. Jones also opined:

Regarding her right shoulder, I do not believe that the activity she was performing would result in a significant anterior and superior labral tear. I believe she did have a preexistent labral tear. However, the activity that she was performing certainly could have aggravated the presence of a pre-existing labral tear. The issue then extends in that her present clinical examination suggests that she would not have been able to do that work activity if this was performed to the degree that she is at this time and symptomatic as it is at this time. Therefore, it would suggest that the aggravation which occurred during the injury may have resulted in further tearing of the labrum to the point that it is now symptomatic and requires surgical correction.

I believe that surgical treatment for her right shoulder is necessary. I again state that the mechanism of her activity would not cause a superior and anterior labral tear but in my opinion her work activities likely aggravated or extended the tear. She has no other history or evidence that would suggest a cause for the increase in her symptoms.⁵

Dr. Jones believed claimant’s work injury “aggravated [a] preexistent disease process in the shoulder but has resulted in symptoms that require additional treatment that were not present prior to the activity or injury.”⁶

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-508(f) states in part:

² Dr. Jones’ report at 2.

³ *Id.*

⁴ The compensability of claimant’s thoracic spine injury is not an issue before the Board.

⁵ *Id.* at 3.

⁶ *Id.* at 4.

(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

The undersigned Board Member finds claimant’s September 4, 2014, injury did not solely aggravate a preexisting condition. The claim is therefore compensable and the preliminary hearing Order must be reversed.

Claimant sustained an “injury” as that term is defined by the Act. The lesion or change in the physical structure of claimant’s body was the additional tearing of the labrum in claimant’s right shoulder caused by the accident. The evidence establishes that the part the labrum torn by the accident was uninjured before the accident on September 4, 2014. The ALJ correctly noted claimant’s accident extended the preexisting tear of the labrum. However, the additional tearing of the structure is not solely an aggravation of the preexisting tear. Claimant sustained a new injury to the labrum where no injury, symptoms or need for treatment existed before the accident.

Moreover, whether or not there is an aggravation of a preexisting condition, the analysis does not end there. K.S.A. 44-508(f)(2) does not bar compensability for *any* aggravation of a preexisting condition. Under that statute, we must address whether claimant “solely” aggravated her preexisting condition. The Legislature intended the word “solely” to mean something. The Kansas Workers Compensation Act does not define the term, but “solely” has been judicially defined as “singly” or “[e]xclusively.”⁷ Therefore, if claimant has an injury above and beyond a sole aggravation of her preexisting condition, such as a new physical injury, the statute does not bar compensability.⁸ See *Le*⁹ and the cases discussed therein.

The Appeals Board has found that accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having aggravated a preexisting condition. Several prior decisions tend to

⁷ *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 2010 WL 1462763 (Kansas Court of Appeals unpublished opinion dated Apr. 8, 2010).

⁸ See *Sowers v. Kingman Community Hospital*, No. 1,065,624, 2016 WL 858316 (Kan. WCAB Feb. 22, 2016).

⁹ *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d ___, 364 P.3d 571, rev denied ___ Kan. ___ (2015).

show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.¹⁰

- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.¹¹

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.¹²

- An accident did not solely aggravate, accelerate or exacerbate a claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.¹³

- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.¹⁴

- A motor vehicle accident did not solely aggravate, accelerate or exacerbate claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.¹⁵

The Board has no jurisdiction to address claimant's constitutional argument. The Board has held many times that it is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. Claimant may preserve those arguments for future determination before a proper court.¹⁶

¹⁰ *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

¹¹ *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

¹² *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB Jul. 13, 2012).

¹³ *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

¹⁴ *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

¹⁵ *Gilpin v. Lanier Trucking Co.*, No. 1,059,754 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

¹⁶ *Breedlove v. Richardson Hauling, Inc.*, No.1,046,084 2015 WL 5918866 (Kan. WCAB Sept. 21, 2015).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

1. Claimant's accidental injury was not a sole aggravation of a preexisting condition, and the claim is therefore compensable.

2. The Board has no jurisdiction to address claimant's argument that K.S.A. 44-508(f)(2) is unconstitutionally vague.

DECISION

WHEREFORE, the undersigned Board Member finds that the preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh dated February 24, 2016, is reversed and the claim is remanded for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of April, 2016.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
stacia@lojemkc.com
jimmartin@lojemkc.com

Jodi J. Fox, Attorney for Respondent and its Insurance Carrier
mvpkc@mvplaw.com
jfox@mvplaw.com

Honorable Kenneth J. Hursh, Administrative Law Judge

¹⁷ K.S.A. 44-534a.